82-1959

No.

In the Supreme Court of the United States

October Term, 1982

ARNOLD INDUSTRIES, INC., and
GEORGE BLACKSTONE,
Petitioners,

vs.

ARTHUR STICKLER,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether a Notice of Appeal Filed Prior to the Entry of a Nunc Pro Tunc Rule 54(b) Certification is Effective to Vest Jurisdiction in the Court of Appeals.

2. Whether a Rule 54(b) Certification is Necessary When All Non-Adjudicated Claims Have Been Stayed Indefinitely by Statute.

3. Whether the "Exceptional Circumstances" Doctrine of *Harris Truck Lines, Inc. v. Cherry Meat Packers*, 371 U.S. 215 (1962), and *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964) Should Have Been Applied in This Case.

LIST OF PARTIES TO PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

ARTHUR STICKLER: *Plaintiff-Appellee*
ARNOLD INDUSTRIES, INC.,

and

GEORGE BLACKSTONE: *Defendants-Appellants*

Arnold Industries, Inc., and George Blackstone are the Petitioners herein; Arthur Stickler is the Respondent.

Arnold Industries, Inc. has no parent company and owns no subsidiary companies.

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For the Tenth Circuit

Petitioners Arnold Industries, Inc. and George Blackstone respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on October 22, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported and is reprinted at A1 of the Appendix to this petition. The judgment of the United States District Court for the District of Colorado dated March 2, 1982, is unreported and is reprinted at A4 of the Appendix. The June 17, 1982 Order of the District Court is unreported and is reprinted at A6 of the Appendix.

JURISDICTION

The judgment sought to be reviewed by this petition was rendered and entered on October 22, 1982. A timely petition for rehearing was filed in the court below and was denied on March 4, 1983. A10. This petition for certiorari is filed within ninety days of the denial of the petition for rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

11 U.S.C. §362 provides in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under sections 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

STATEMENT OF THE CASE

This is a damage action for breach of contract filed in the United States District Court for the District of Colorado. Jurisdiction is based upon diversity of citizenship, 28 U.S.C. §1332. Following a trial by jury, judgment was entered on March 2, 1982 in favor of plaintiff-respondent Arthur Stickler against defendant Taos Equip-

ment Manufacturers, Inc. in the amount of $4,100.00 actual damages and $250,000.00 exemplary damages and against defendants-petitioners Arnold Industries, Inc. and George Blackstone, jointly and severally, in the amount of $483,350.00 actual damages and $800,000.00 exemplary damages. A4-A5.

The judgment of March 2, 1982 did not dispose of plaintiff's claims against defendants David Kimball and Larry Krogness because each of them had earlier filed personal bankruptcy petitions which stayed the action against them. *See* 11 U.S.C. §362. The district court did not add to the March 2 judgment a Rule 54(b) certification. Petitioners' timely post-trial motions for judgment n.o.v., for a new trial, and to amend the judgment were all denied on April 19, 1982. On April 22, 1982, petitioners filed a notice of appeal from the judgment of March 2.

By letter dated June 4, 1982, the United States Court of Appeals for the Tenth Circuit advised petitioners that it would consider summary dismissal of the appeal for lack of jurisdiction. In response to that letter the parties filed a joint motion in the district court seeking a Rule 54(b) certification. On June 17, 1982 the district court made such a certification, specifically designating the certification to be effective and the judgment final on March 2, 1982 *nunc pro tunc*. A6. The Tenth Circuit was advised of the action taken by the parties and the *nunc pro tunc* order of the district court. No new notice of appeal was filed.

On October 22, 1982, the Tenth Circuit issued a per curiam decision dismissing the appeal on the ground that the April 22 notice of appeal was premature. A1. The court of appeals ruled that a premature notice of appeal cannot be cured by a subsequent *nunc pro tunc* Rule 54(b) certification. The court further held that the *nunc pro*

tunc 54(b) certification entered June 17 merged with the prior order of March 2, 1982 to become a final judgment as of June 17.

Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied on March 4, 1983. A10.[1]

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1. On November 5 1982, petitioners filed in the district court a Motion for Relief from Judgment pursuant to Fed. R. Civ. P. 60(b). On November 23, while the Petition for Rehearing was pending in the Tenth Circuit, the district court granted the motion, vacated the Judgment of March 2 and the Order of June 17, and entered a new judgment against petitioners containing a Rule 54(b) certification. A8. Although a timely notice of appeal was filed thereafter by petitioners, respondent has filed a cross-appeal contesting the district court's jurisdiction to grant the 60(b) motion and challenging the November 23 judgment as an improper extension of the time for filing a notice of appeal. *Cf.* Fed. R. App. P. 4(a), 26(b); Fed. R. Civ. P. 6(b); *Griggs v. Provident Consumer Discount Co.*, 103 S. Ct. 400, 403-04 n.3 (1982).

These proceedings in the courts below should not pose a barrier to the granting of this petition. The issue of whether petitioners have filed a timely appeal for review of the merits of the judgment is not yet moot; that dispute remains a "live" one. Nor does the fact that the Tenth Circuit has not yet ruled on the appropriateness of the district court's 60(b) decision bar consideration of the issues raised in this petition. In *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956), the Court granted certiorari to consider the effect of a 54(b) certification on the court of appeals' jurisdiction, even though the court of appeals had addressed the issue, had accepted jurisdiction, and was continuing to consider the case on the merits. *See id.* at 450.

In addition, a failure to petition for certiorari at this stage may be prejudicial in any future proceedings, so petitioners are virtually forced to petition now. *See Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952); *Angel v. Bullington*, 330 U.S. 183 (1947); *Lytle v. Commissioners of Election*, 541 F.2d 421, 425 (4th Cir. 1976), *cert. denied*, 438 U.S. 904 (1978).

If the Court is inclined to grant the petition but is concerned about the effect of these lower court proceedings, petitioners request that it defer consideration until after the Tenth Circuit decides whether to address the merits of the appeal below. If the Tenth Circuit does reach the merits of the appeal, petitioners will voluntarily dismiss this petition. If the court of appeals refuses to accept jurisdiction to hear the merits, this petition should then be granted.

REASONS FOR GRANTING THE WRIT

A. Introduction.

This case presents the complex and heretofore unresolved interplay between *nunc pro tunc* Rule 54(b) certifications, notices of appeal filed prior to the rendition of such certifications, and recently amended Rule 4(a) of the Federal Rules of Appellate Procedure.

The effect of *nunc pro tunc* 54(b) certifications on appeals from technically non-final judgments, a question never addressed by this Court, has had a roller coaster history in the circuit courts, leaving judicial pronouncements and expert commentaries on the issue hopelessly confused. The decision of the panel below is in direct conflict with the Seventh Circuit's decision in *Local P-171 Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065 (7th Cir. 1981), which recognized the validity of *nunc pro tunc* 54(b) certifications and their utility for perfecting appeals from technically non-final orders. The Tenth Circuit's refusal to give effect to the district court's express *nunc pro tunc* intention also (1) conflicts with every Supreme Court interpretation of the purposes supporting Rule 54(b) and the role the district court is expected to perform in execution of the Rule, (2) ignores well-established principles regarding *nunc pro tunc* orders generally, and (3) fails to heed the clear prerequisites of finality delineated in Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

In addition, by refusing to give effect to the notice of appeal filed April 22, 1982, the Tenth Circuit's decision below is in direct conflict with the decisions of the Third Circuit in *Tilden Financial Corp. v. Palo Tire Service, Inc.*, 596 F.2d 604 (3d Cir. 1979), and the Seventh Circuit

in *Sutter v. Groen*, 687 F.2d 197 (7th Cir. 1982). The decision is also in apparent conflict with the language and intent of the 1979 amendments to Fed. R. App. P. 4(a), designed to avoid the loss of the right to appeal by filing a notice of appeal prematurely.

A definitive resolution by the Supreme Court of the interrelated procedural questions presented by this petition is essential to resolve the confused relationship between *nunc pro tunc* 54(b) certifications and pending appeals and to resolve the conflicting decisions and conceptual inconsistencies which have arisen among the circuits.

B. The Relationship Between Notices of Appeal and Subsequent Nunc Pro Tunc Certifications Is Hopelessly Confused and the Circuits Are in Conflict.

The incipient use of *nunc pro tunc* 54(b) certifications arose shortly after Rule 54(b) was amended in 1946 to require an "express determination that there is no just reason for delay" and an "express direction for the entry of judgment" before a judgment on less than all the claims presented in an action could be appealed. Initially, appeals from partial judgments lacking such certifications were permitted to be cured by obtaining *nunc pro tunc* certifications, as was done in this case. *See Vale v. Bonnett*, 191 F.2d 334 (D.C. Cir. 1951); *Kaufman & Ruderman, Inc. v. Cohn*, 177 F.2d 849 (2d Cir. 1949); 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶54.41[4] (2d ed. 1982) (hereinafter cited as "MOORE'S FEDERAL PRACTICE").

Subsequent decisions by other circuits rejected this approach, however, apparently on the ground that the filing of a notice of appeal, and the subsequent pendency

of that appeal, automatically divested the district court of jurisdiction to enter *any* certification, *nunc pro tunc* or otherwise. *See, e.g., Williams v. Bernhardt Bros. Tugboat Service, Inc.*, 357 F.2d 883 (7th Cir. 1966); *Bush v. United Benefit Fire Insurance Co.*, 311 F.2d 893 (5th Cir. 1963); *District 65, Distributive Processing & Office Workers Union v. McKague*, 216 F.2d 153 (3d Cir. 1954); 6 MOORE'S FEDERAL PRACTICE ¶54.41[4].

Yet more recent judicial consideration of the esoteric doctrine of "jurisdictional shift" has raised doubts as to the conceptual validity of ignoring *nunc pro tunc* 54(b) certifications. A split of authority has apparently developed in the circuits as to the effect on a district court's jurisdiction of the filing of a notice of appeal seeking review of a technically non-appealable order, making the question of the effect on jurisdiction of a notice of appeal from a partial judgment lacking a Rule 54(b) certification "clouded" according to the experts. *See* 9 MOORE'S FEDERAL PRACTICE ¶203.11 at 3-51. The better view, for persuasive reasons outlined in MOORE'S FEDERAL PRACTICE at ¶203.11, has been adopted by a majority of the courts of appeals and holds that an appeal taken from a non-final judgment does *not* divest the district court of jurisdiction to take further action with respect to that judgment. *See Hodgson v. Mahoney*, 460 F.2d 326 (1st Cir.), *cert. denied*, 409 U.S. 1039 (1972); *Leonhard v. United States*, 633 F.2d 599 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *Tilden Financial Corp. v. Palo Tire Service, Inc.*, 596 F.2d 604 (3d Cir. 1979); *United States v. Hitchmon*, 602 F.2d 689 (5th Cir. 1979) (en banc); *Cochran v. Birkel*, 651 F.2d 1219 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152 (1982); *Local P-171 Amalgamated Meat Cutters v. Thompson Farms Co.*, 642 F.2d 1065 (7th Cir. 1981); *Ruby v. Secretary of the United States Navy*, 365 F.2d 385 (9th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1011 (1967); *Arthur Andersen &*

Co. v. Finesilver, 546 F.2d 338 (10th Cir. 1976), *cert. denied,* 429 U.S. 1096 (1977).

The obvious conflict between this general rule and the approach utilized by the Tenth Circuit below in the context of a *nunc pro tunc* 54(b) certification, a narrow approach which has apparently been abandoned even by those circuits which initially adopted it, *compare Tilden Financial Corp. v. Palo Tire Service, Inc.* (3d Cir. 1979), *supra, with District 65, Distributive, Processing & Office Workers Union v. McKague* (3d Cir. 1954), *supra*; *Local P-171 Amalgamated Meat Cutters v. Thompson Farms Co.* (7th Cir. 1981), *supra, with Williams v. Bernhardt Bros. Tugboat Service, Inc.* (7th Cir. 1966), *supra,* is noted in footnote 35 of 9 MOORE'S FEDERAL PRACTICE ¶203.11 but is left unresolved by that treatise's authors.

The net effect is a confusing conflict between the circuits as to the effect to be given *nunc pro tunc* 54(b) certifications. In particular, the Tenth Circuit decision below squarely conflicts with the Seventh Circuit's decision in *Local P-171, supra,* which gave effect to such a *nunc pro tunc* certification. *See also A.O. Smith Corp. v. Sims Consolidated Ltd.,* 647 F.2d 118, 120 (10th Cir. 1981) (expressly rejecting *Local P-171*). The Court should grant this petition to resolve this conflict.

C. The Tenth Circuit's Decision Conflicts With the Purposes of Rule 54(b) As Articulated by This Court.

This Court has held that the district court's intention is paramount in the Rule 54(b) context. It is clear that "the district court [is] to determine the 'appropriate time' *when* each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1, 8 (1980) (emphasis added); *Sears, Roebuck*

& *Co. v. Mackey*, 351 U.S. 427, 437 (1956). Although the district court's decision as to when a 54(b) situation is ripe for appeal is reviewable upon an abuse of discretion standard, the Tenth Circuit did not find here that the district court abused its discretion.

The drafters of Federal Rule 54(b) envisioned that the parties in multi-party litigation would be able to rely on the express direction from the district court to remove any uncertainty regarding the appealability of a final judgment which disposes of fewer than all parties or claims involved in the case. The requirement in Rule 54(b) that the district court make an "express determination" and "express direction" for the entry of judgment eliminates any doubt as to whether an immediate appeal may be sought from a judgment disposing of fewer than all of the claims or parties in a litigation. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950). When a Rule 54(b) order is interpreted by a court of appeals in a way that conflicts with the actual intention of the district court, the policy behind Rule 54(b) of alleviating ambiguity is frustrated and substantial rights of the parties are impaired.

If the Tenth Circuit had given effect to the district court's unequivocal intentions, the merits of this case would already have been argued and decided by the court of appeals, the subsequent activity in the district court would have been avoided, and this petition would have been unnecessary. The interplay between *nunc pro tunc* 54(b) certifications and previously filed notices of appeal is extremely important and requires immediate attention by this Court.[2]

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2. District judges possess broad discretionary power to enter orders or judgments *nunc pro tunc*. *See, e.g., Slicer v. Bank of Pittsburg*, 57 U.S. (16 How.) 571, 579 (1853). Indeed, *nunc pro tunc* entries are permissible when necessary to complete

(Continued on following page)

D. The Tenth Circuit's Decision Ignores the Requirements of Rules 58 and 79.

By refusing to give effect to the district court's *nunc pro tunc* intention, the Tenth Circuit's decision below is confusing in another respect. Even if the district court's Rule 54(b) certification "merges with the prior order to become a final judgment," A3, it cannot be said to be "final" on June 17 because no judgment entry under Rule 79(a) was made by the Clerk on that date and no "separate document" meeting the Rule 58 specifications for a judgment effective on that date appears of record. Fed. R. App. P. 4(a)(6); *see Bankers Trust Company v. Mallis,* 435 U.S. 381 (1978); *United States v. Indrelunas,* 411 U.S. 216 (1973).

Although there exist here two documents which refer to the Judgment of "March 2, 1982" and either of which may satisfy the separate document requirement for the finality of a judgment for that date, there is absolutely nothing in either of them to indicate a judgment that was to be effective or entered on June 17, 1982. Moreover, the judgment from which petitioners appealed was entered under Rule 79(a) on March 2, 1982. No judgment was entered on June 17, 1982.

Footnote continued—

or perfect appeals. *Shepherd v. Pepper,* 133 U.S. 626 (1890); *United States v. Vigil,* 77 U.S. (10 Wall.) 423 (1870); *Brobst v. Brobst,* 69 U.S. (2 Wall.) 96 (1864). In particular, *nunc pro tunc* orders are appropriate when used to validate appeals which are technically premature. *Wheeler v. American Home Products Corp.,* 582 F.2d 891, 893 (6th Cir. 1977); 6A MOORE'S FEDERAL PRACTICE ¶58.08 at 58-306 to -307.

By refusing without explanation to give effect to the district court's *nunc pro tunc* order, the court of appeals so far departed from the accepted and usual course of practice as to call for the exercise of this Court's supervisory authority. This petition should be granted to explain the applicability of these general principles to *nunc pro tunc* 54(b) certifications.

Although it has been held that the Rule 58 requirement can be met by giving effect to a *nunc pro tunc* order, *see Wheeler v. American Home Products Corp., supra;* 6A MOORE'S FEDERAL PRACTICE ¶58.08 at 58-306, the Tenth Circuit did not give effect to the district court's *nunc pro nunc* intention, and the requirements of Rules 58 and 79(a) for a judgment and entry effective June 17, 1982 have not been met. Because the decision below has ignored these two requirements, the Court should grant this petition and clarify the interrelationship between *nunc pro tunc* 54(b) certifications and Rules 58 and 79(a).

E. The Court of Appeals Has Refused to Apply the Express Language of Fed. R. App. P. 4(a)(2).

Even if it could properly ignore the district court's *nunc pro tunc* intention, the court of appeals' decision nevertheless conflicts with the express provisions of Fed. R. App. P. 4(a)(2). The general rule, stated in subsection 4(a)(2), is that premature notices are effective to vest jurisdiction in the court of appeals. "Rule 4(a)(2) . . . extend[s] to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely." Fed. R. App. P. 4 advisory committee note. The *only* exceptions to this general rule are listed in subsection 4(a)(4), all of which "destroy the finality of the judgment". Fed. R. App. P. 4 advisory committee note. *See also Needham v. White Laboratories, Inc.*, 102 S. Ct. 427, 428 (1981) (Rehnquist, *J.*, dissenting from the denial of certiorari). None of the 4(a)(4) exceptions involve the rendition of Rule 54(b) certifications or motions therefor. The panel below, apparently relying on *A.O. Smith Corp.*, assumed without discussion that such motions fell within 4(a)(4), even though the requirements of 54(b) are no-

where mentioned there and even though the 54(b) certification does not destroy the finality of the judgment from which the appeal is taken.

The decisions from other circuits on the issue of the effectiveness of a notice of appeal filed prior to the entry of a Rule 54(b) certification which lacks *nunc pro tunc* effect are in conflict with the decision below and *A.O. Smith*. In both *Tilden Financial Corp. v. Palo Tire Service, Inc.*, 596 F.2d 604, 606-07 (3d Cir. 1979), and *Sutter v. Groen*, 687 F.2d 197, 199 (7th Cir. 1982), the courts of appeals for the Third and Seventh Circuits held that they were vested with jurisdiction to consider the appeals therein even though the notices of appeal in each were filed prior to the Rule 54(b) certification.[3] *See also Lemke v. United States*, 346 U.S. 325 (1953) (in criminal appeal context, notice of appeal filed prior to entry of judgment is effective); *Leonhard v. United States*, 633 F.2d 599, 611 (2d Cir. 1980) (premature notices of appeal become effective when subsequent actions of the district court make final the order or judgment from which an appeal is taken (citing cases)), *cert. denied*, 451 U.S. 908 (1981); *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 680-81 (9th Cir. 1980) (same); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 955 n.4 (3d Cir. 1980) (following *Tilden*), *cert. denied*, 450 U.S. 959 (1981). By contrast, the Eleventh Circuit apparently has adopted the approach utilized by the Tenth Circuit here. *See McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981), *cert. denied*, 102 S. Ct. 2249 (1982). This petition should be granted to resolve this conflict and to clarify how

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3. Indeed, the Tenth Circuit itself has in the past given effect to premature notices in the Rule 54(b) context. *Morris v. Uhl & Lopez Engineers, Inc.*, 442 F.2d 1247 (10th Cir. 1971); *Frankfort Oil Co. v. Snakard*, 279 F.2d 436, 438 (10th Cir.), *cert. denied*, 364 U.S. 920 (1960). The panels below and in *A.O. Smith* neglected to distinguish or even cite these two intra-circuit precedents.

notices of appeal filed before the grant of Rule 54(b) certifications are to be treated under Fed. R. App. P. 4(a).

F. The Judgment of March 2, Was a Final, Appealable Judgment and No 54(b) Certification Was Necessary.

Prior to trial defendants Kimball and Krogness filed bankruptcy petitions under Chapter 7 of the Bankruptcy Reform Act of 1978, 11 U.S.C. §101 *et seq.* listing plaintiff-respondent Arthur Stickler as a creditor. By operation of the automatic stay provision of that Act, 11 U.S.C. §362, no further judicial proceedings against those defendants could take place, *see generally* 2 COLLIER ON BANKRUPTCY ¶362.04 (15th ed. 1982), and the district court here stayed the proceedings as to the bankrupt defendants. Furthermore, defendant Kimball was granted a bankruptcy discharge on November 20, 1981, the effect of which was to enjoin permanently the continuation of the action as against him. 11 U.S.C. §524.

There remained no issues to be decided by the district court. There would be no inconvenience or costs of piecemeal review because the claims against Krogness and Kimball might never be litigated. This petition should be granted to clarify the relationship between 11 U.S.C. §362 and Fed. R. Civ. P. 54(b) and to correct the judgment below.

G. The "Exceptional Circumstances" Doctrine of Harris Truck Lines, Inc. v. Cherry Meat Packers, 371 U.S. 215 (1962), and Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964) Should Have Been Applied in This Case.

When a party takes an action which is technically erroneous but which, if properly done, would have served to

protect the right to appeal, and the district court concludes that the act was in fact properly done, the doctrine of exceptional or unique circumstances permits the appeal to be heard on the merits. *Thompson v. Immigration and Naturalization Service,* 375 U.S. 384 (1964); *Harris Truck Lines, Inc. v. Cherry Meat Packers,* 371 U.S. 215 (1962).

In order to invoke the *Thompson* exception, two prerequisites must be met: (1) the appellant must rely on a statement by the district court and (2) he must perform an act which, if timely done, would preserve his right to appeal. *Needham v. White Laboratories, Inc.,* 102 S. Ct. 427, 429 (1981) (Rehnquist, *J.*, dissenting from the denial of certiorari).

Both of these prerequisites have been met here. The petitioners relied on the *nunc pro tunc* statement and intention of the district court's June 17, 1982 certification and order, a statement and intention the court of appeals later held the district court could not properly make or have. If timely made, the district court's 54(b) certification would have preserved petitioners' right to appeal. Indeed, each separate act—the filing of the notice of appeal and the entry of the 54(b) certification—standing alone was timely; the court of appeals held simply that the reversal in the order of their occurrence destroyed the timeliness of both. Under these circumstances, the policy considerations underlying *Thompson* and the federal rules of civil and appellate procedure require that the Tenth Circuit's judgment below be vacated.

CONCLUSION

The Supreme Court should grant this petition for at least six reasons:

1. The decision below squarely conflicts with the Third Circuit's decision in *Tilden Financial Corp. v. Palo Tire Services, Inc.* and the Seventh Circuit's decisions in *Local P-171 Amalgamated Meat Cutters v. Thompson Farms Co.* and *Sutter v. Groen.*

2. The decision below perpetuates the utter confusion surrounding the interplay between Rule 54(b) certifications, *nunc pro tunc* or otherwise, notices of appeal filed before the entry of such certifications, and recently amended Rule 4(a) of the Federal Rules of Appellate Procedure.

3. The rationale upon which the decision below is based conflicts with the letter and the spirit of every decision of this Court construing the operation of Rule 54(b) and has effected a result which is contrary to the purposes for which Rule 54(b) was drafted.

4. The decision below violates those principles recognized by this Court as governing the propriety and effect of *nunc pro tunc* orders generally.

5. The Tenth Circuit's decision ignores the express requirements of Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

6. The Tenth Circuit has misinterpreted the intention and effect of the 1979 amendments to Rule 4 of the Federal Rules of Appellate Procedure.

Review is necessary to resolve these conflicts, to clarify the interplay between the rules of procedure involved in this context so as to insure their uniform application, and to reverse the clearly erroneous decision of the court below.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT

(Filed October 22, 1982)

No. 82-1553

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ARTHUR STICKLER,
Plaintiff-Appellee,

v.

ARNOLD INDUSTRIES, INC., an Ohio Corporation, and GEORGE BLACKSTONE,
Defendants-Appellants,

TAOS EQUIPMENT MANUFACTURERS, INC., a New Mexico Corporation, DAVID KIMBALL, LARRY KROGNESS,
Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. 80-Z-419)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Before SETH, *Chief Judge,* MCKAY and SEYMOUR, *Circuit Judges.*

PER CURIAM.

This three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed.R.App.P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from the judgment of the district court awarding plaintiff actual and exemplary damages for alleged breach of contract.

Following a trial by jury, judgment was entered on March 2, 1982 in favor of plaintiff against defendant Taos Equipment Manufacturers, Inc. in the amount of $4,140 actual damages and $250,000 exemplary damages and against defendants Arnold Industries, Inc. and George Blackstone, jointly and severally, in the amount of $483,350 actual damages and $800,000 exemplary damages. The order of March 2, 1982 did not dispose of the claims against defendants Kimball and Krogness nor did it expressly direct entry of final judgment as to defendants Taos Equipment Manufacturers, Arnold Industries and George Blackstone, pursuant to Rule 54(b) of the Fed.R.Civ.P. Defendants' motion for judgment notwithstanding the verdict, motion for new trial and motion to amend judgment were denied on April 19, 1982. On April 22, 1982, defendants Arnold Industries and George Blackstone filed a notice of appeal.

This court advised the parties that it was considering summary dismissal of the appeal for lack of appellate jurisdiction and directed the parties to address that issue. The parties immediately filed a joint motion in district court seeking a Rule 54(b) determination. On June 17, 1982, the district court entered an order certifying the prior judgment as a final judgment pursuant to Rule 54(b),

nunc pro tunc March 2, 1982. The parties then filed a joint response in this appeal, requesting the court, as a matter of equity, to permit perfection of the appeal subsequent to the filing of the notice of appeal.

There is no question that this court lacked appellate jurisdiction at the time the notice of appeal was filed. Rule 54(b) provides that in cases involving multiple claims or multiple parties, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment. Absent such a determination, an order which adjudicates the rights and liabilities of fewer than all the parties does not terminate the action and is not final for purposes of appeal. Golden Villa Spa, Inc. v. Health Industries, Inc., 549 F.2d 1363 (10th Cir. 1977).

In this circuit appellate jurisdiction must exist at the time of filing the notice of appeal. Parties cannot cure a jurisdictional default by subsequently obtaining a Rule 54(b) certification. A.O. Smith Corp. v. Sims Consolidated, Ltd., 647 F.2d 118 (10th Cir. 1981). The Rule 54(b) certification merges with the prior order to become a final judgment, appealable only upon the timely filing of a new notice of appeal. The notice of appeal filed April 22, 1982 was premature and no notice of appeal was filed subsequent to the Rule 54(b) certification. Accordingly, the appeal is dismissed for lack of jurisdiction.

APPEAL DISMISSED.

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed March 2, 1982)

Civil Action No. 80-Z-419

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ARTHUR STICKLER,
Plaintiff,

v.

ARNOLD INDUSTRIES, INC., an Ohio corporation, GEORGE BLACKSTONE, and TAOS EQUIPMENT MANUFACTURERS, INC., a New Mexico corporation,
Defendants.

JUDGMENT

This action came on for trial on February 23, 1982 before the Court and, through stipulation of counsel, a jury of eight duly sworn to try the issues herein, the Honorable Zita L. Weinshienk, Judge, presiding.

The trial proceeded to conclusion and the jury subsequently returned with a verdict for the plaintiff, it is hereby

ORDERED that judgment is entered for the plaintiff and against defendant Taos Equipment Manufacturers, Inc., in actual damages in the amount of $4,140.00 and exemplary damages in the amount of $250,000.00 for a total amount of $254,140.00, and it is

FURTHER ORDERED that judgment is entered for the plaintiff and against defendants Arnold Industries, Inc., and George Blackstone, in actual damages in the amount of $483,350.00 and exemplary damages in the amount of $800,000.00 for a total amount of $1,283,350.00, and it is

FURTHER ORDERED that said judgments are joint and several and shall accrue interest at the legal rate as provided by law, and it is

FURTHER ORDERED that plaintiff shall have his costs upon the filing of a Bill of Costs with the Clerk of this Court within ten (10) days of the entry of this judgment.

DATED at Denver, Colorado this 2nd day of March, 1982.

FOR THE COURT:

JAMES R. MANSPEAKER, *Clerk*
By: /s/ STEPHEN P. EHRLICH
Chief Deputy Clerk

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 17, 1982)

Civil Action No. 80-Z-419

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ARTHUR STICKLER,
Plaintiff,

v.

ARNOLD INDUSTRIES, INC., an Ohio corporation; GEORGE BLACKSTONE; TAOS EQUIPMENT MANUFACTURERS, INC., a New Mexico corporation; DAVID KIMBALL; and LARRY KROGNESS,
Defendants.

ORDER

This matter is before the Court on the Joint Motion of Plaintiff and Defendants Arnold Industries and George Blackstone to enter Rule 54(b) Determination. It is

ORDERED that the Joint Motion of Plaintiff and Defendants Arnold Industries and George Blackstone to Enter Rule 54(b) Determination is granted.

Because defendant David Kimball and defendant Larry Krogness each filed a bankruptcy petition listing plaintiff as a creditor, stay orders were in effect as to both said defendants during the pendency of this lawsuit. For this reason the Court finds that there was and is no just reason for delay, and it is, therefore,

FURTHER ORDERED that the Judgment of March 2, 1982, entered against defendants Arnold Industries, Inc., George Blackstone, and Taos Equipment Manufacturers, Inc., is affirmed and is a final judgment pursuant to Fed. R.Civ.P. 54(b), nunc pro tunc March 2, 1982.

DATED at Denver, Colorado, this 17th day of June, 1982.

BY THE COURT:

/s/ ZITA L. WEINSHIENK, *Judge*
United States District Court

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 23, 1982)

Civil Action No. 80-Z-419

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ARTHUR STICKLER,
Plaintiff,

v.

ARNOLD INDUSTRIES, INC., an Ohio corporation; GEORGE BLACKSTONE; TAOS EQUIPMENT MANUFACTURERS, INC., a New Mexico corporation; DAVID KIMBALL; and LARRY KROGNESS,
Defendants.

ORDER AND JUDGMENT

This matter is before the Court on November 23, 1982, on defendants Arnold Industries, Inc., and George Blackstone's Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b). The Court has considered the statements and arguments of counsel and has made oral findings of fact and conclusions of law, which are incorporated by reference as if fully set forth herein. Accordingly, it is

ORDERED that the defendants' Motion for Relief from Judgment pursuant to Fed.R.Civ.P. 60(b) be, and it hereby is, granted; and it is

FURTHER ORDERED that this Court's Judgment of March 2, 1982, and its Order of June 17, 1982, pertaining

to the Rule 54(b) motion, be, and they hereby are, vacated; and it is

FURTHER ORDERED that judgment is entered for the plaintiff and against defendant Taos Equipment Manufacturers, Inc., in actual damages in the amount of $4,140.00 and exemplary damages in the amount of $250,000.00 for a total amount of $254,140.00; and it is

FURTHER ORDERED that judgment is entered for the plaintiff and against defendants Arnold Industries, Inc., and George Blackstone, in actual damages in the amount of $483,350.00 and exemplary damages in the amount of $800,000.00 for a total amount of $1,283,350.00; and it is

FURTHER ORDERED that said judgments are joint and several and shall accrue interest from March 2, 1982, at the legal rate as provided by law; and it is

FURTHER ORDERED that the costs previously taxed in favor of plaintiff are hereby confirmed; and it is

FURTHER ORDERED that, because defendant David Kimball and defendant Larry Krogness each filed a bankruptcy petition listing plaintiff as a creditor and because stay orders were in effect as to both said defendants during the pendency of this lawsuit, the Court finds that there is no just reason for delay; and it is

FURTHER ORDERED that the judgment entered hereby against defendants Arnold Industries, Inc., and George Blackstone be, and it hereby is, certified as a final judgment pursuant to Fed.R.Civ.P. 54(b) as of the date of the filing of this Order.

DATED at Denver, Colorado, this 23rd day of November, 1982.

BY THE COURT:

/s/ ZITA L. WEINSHIENK
Judge United States District Court

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC

(Filed March 4, 1983)

No. 82-1553

Before Honorable OLIVER SETH, *Chief Judge*, Honorable WILLIAM J. HOLLOWAY, JR., Honorable ROBERT H. McWILLIAMS, Honorable JAMES E. BARRETT, Honorable WILLIAM E. DOYLE, Honorable MONROE G. McKAY, Honorable JAMES K. LOGAN and Honorable STEPHANIE K. SEYMOUR, *Circuit Judges*, United States Court of Appeals

ARTHUR STICKLER,
Plaintiff-Appellee,

v.

ARNOLD INDUSTRIES, INC., an Ohio Corporation, and GEORGE BLACKSTONE,
Defendants-Appellants,

TAOS EQUIPMENT MANUFACTURERS, INC., a New Mexico Corporation, DAVID KIMBALL, LARRY KROGNESS,
Defendants.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration thereof, the petition for rehearing is denied by the panel to whom the case was originally submitted.

The petition having been denied by the panel and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS
Clerk